tidak dimasukkan dalam senarai pegawai-pegawai polis yang diserahkan untuk pembelaan setelah kes pendakwa ditutup.

Pada pandangan kami pihak pendakwa tidak memanggil langsung ASP Yeow Ah Kee sebagai saksi pandakwa atau menyerahkannya kepada pembelaan dan ini adalah suatu kegagalan yang serius dalam konteks kes ini. Ini ialah kerana semua barang kes ada di dalam jagaannya dari tahun 1985 hingga tahun 1989 — iaitu dalam tempoh masa yang agak panjang! Dalam keadaan yang demikian tentulah ada keraguan dengan barang kes itu lebih-lebih lagi jika dilihat dari segi pengesahan dadah yang dibangkitkan dalam isu yang pertama di atas.

Memanglah benar seperti yang disebut dalam kes *Su Ah Ping* v *PP*[2] di mana Mahkamah Persekutuan telah memutuskan bahawa tidaklah dikehendaki pihak pendakwa memanggil kesemua pegawai atau orang yang berkenaan yang telah melihat atau mengecam sesuatu barang kes. Ini bukunlah maksud undang-undang yang sebenarnya. *Su Ah Ping*[2] hanya memutuskan prinsip am. Tetapi fakta kes berbeza di antara satu dengan lain dan kewajipan pendakwa dalam satu-satu kes ialah untuk membuktikan kes itu dengan tidak menimbulkan apa-apa keraguan yang munasabah kepada mahkamah. Kes hendaklah dibuktikan dengan kemas tanpa keraguan atau persoalan yang boleh dibangkitkan berkenaan dengan barang kes. Lihat juga *Teoh Hoe Chye* v *PP*[3] di ms 229. Janganlah ada didapati talian keterangan yang putus sehingga membawa kepada keraguan berkenaan dengan barang kes.

Mahkamah ini juga telah menekankan kehendak undang-undang dalam penjagaan dan penguasaan barang kes dalam rayuan *Mohd Osman bin Pawan* v *PP*[4] di mana perayu telah disabitkan di bawah s 39B(1)(a) Akta Dadah Berbahaya 1952 dan keraguan telah timbul dalam hal yang sama.

Isu ketiga ialah isu yang timbul dari penghakiman yang arif hakim yang membicarakan kes ini. Didapati dengan jelas bahawa dalam penghakimannya, yang arif hakim telah menolak bulat-bulat cerita pembelaan perayu oleh sebab ia berpendapat cerita itu tidak boleh diterima. Tidak ternampak dalam penghakimannya yang arif hakim telah meneliti keterangan yang diberi oleh Insp Sakri dan Kons Ganesan iaitu kemungkinan adanya seorang lain yang telah lari dari kereta tersebut. Jika keterangan dua orang saksi pendakwa ini dipertimbangkan dengan pembelaan perayu, mungkin pembelaan itu boleh diterima khususnya dari aspek penggunaan kereta itu oleh orang selain daripada perayu. Oleh yang demikian kami memutuskan bahawa kegagalan yang arif hakim meneliti dan menimbang keterangan yang diberi oleh dua orang saksi pendakwa tersebut apabila ia mempertimbangkan pembelaan perayu adalah suatu kegagalan yang serius dan mengakibatkan ketidakadilan kepada perayu.

Berdasarkan kepada pendapat kami di atas, kami telah meluluskan rayuan ini. Sabitan dan hukuman yang telah dijatuhkan ke atas perayu diketepikan.

Rayuan dibenarkan.

Peguam: *Kumar Sitham & Co.*

Dilaporkan oleh *Prof Ahmad Ibrahim*

[The following report is a translation of the Bahasa Malaysia judgment reported at pp 235-237. The translation was done by the Malayan Law Journal.]

Abdullah bin Yaacob v Public Prosecutor

SUPREME COURT (KUALA LUMPUR) — CRIMINAL APPEAL NO 05-46-89
HASHIM YEOP A SANI CJ (MALAYA), HARUN HASHIM AND MOHAMED YUSOFF SCJJ
19 FEBRUARY 1991

Criminal Law — Dangerous drugs — Trafficking — Ganja as defined in the Dangerous Drugs Act 1952 — Report and evidence of chemist — Dangerous Drugs Act 1952, s 2

Criminal Procedure — Chain of evidence — Prosecution failing to call witness — Chain of evidence broken — Doubts raised as to exhibits — Failure of trial judge to consider evidence of prosecution witnesses which supported accused's defence

The appellant was convicted on a charge of drug trafficking and sentenced to death. In his appeal three issues were raised: (a) that the chemist had in his evidence said that the substances he had examined were ganja but did not say that they were ganja as defined in s 2 of the Dangerous Drugs Act 1952; (b) that the failure of the prosecution to call or to offer the defence the witness who had received and kept the evidence from 1985 to 1989 resulted in a break in the chain of evidence and led to a miscarriage of justice; (c) that the trial judge in considering the accused's defence, had failed to consider the evidence of prosecution witnesses who testified that it was probable that another person had also run away from the car.

Held, allowing the appeal:

(1) The chemist in his report had affirmed that the substances he had examined were ganja as defined in s 2 of the Dangerous Drugs Act 1952 and it can be concluded that his reference to ganja in his oral evidence had the same definition of ganja as in his report.

(2) The failure of the prosecution to call the police officer who had received and kept the exhibits from 1985 to 1989 is a serious failure in the context of this case. In these circumstances, there was a break in the chain of evidence leading to doubts regarding the exhibits.

(3) If the evidence of the two prosecution witnesses had been considered in the light of the defence of the accused, the defence might have been accepted. The failure of the trial

judge to consider the evidence of the prosecution witnesses in the light of the defence is serious and has led to a miscarriage of justice.

Legislation referred to
Dangerous Drugs Act 1952 ss 2, 39(B)(1)(a)

Cases referred to
1 *PP* v *Ong Tee* [1983] 2 MLJ 407 (refd)
2 *Su Ah Ping* v *PP* [1980] 1 MLJ 75 (refd)
3 *Teoh Hoe Chye* v *PP* [1987] 1 MLJ 220 (folld)
4 *Mohd Osman bin Pawan* v *PP* [1989] 2 MLJ 110 (folld)

Appeal from: Criminal Trial No 11/84 (High Court, Ipoh)

K Kumaraendran for the appellant.
Mohd Yusof bin Hj Zainal Abidin (Deputy Public Prosecutor) for the public prosecutor.

Cur Adv Vult

Hashim Yeop A Sani CJ (Malaya) (delivering the judgment of the court): The appellant was charged under s 39B(1)(a) of the Dangerous Drugs Act 1952 that he on 29 August 1983 at about 5.45pm at Jalan Dato' Tahwil Azar, Ipoh, District of Kinta, Perak, did traffick on his own behalf dangerous drugs, viz ganja weighing 536g. The appellant was first tried on 25 April 1989 and on 23 June 1989 was found guilty, convicted and sentenced to death by hanging. After hearing submissions of the counsel of the two parties in this appeal, this court acquitted the appellant of the charge and we now give the grounds of the decision.

On the day as stated in the charge, a team of policemen led by Insp Sakri (PW4) carried out a surprise raid at Jalan Dato' Tahwil Azar, Ipoh. They saw the appellant in a car No AW 1315 entering a carpark lot near Restoran Rahman. The car, according to the information supplied to the police, was believed to be involved in drug trafficking.

The police rushed towards the car and pulled out the car driver, viz the appellant, and examined his body but did not discover anything. After examining the body of the appellant, Insp Sakri proceeded to examine the interior of the car. After searching for two minutes, he found a package wrapped with old newspapers under the driver's seat. It was found in that package a plastic bag containing ten small packages, nine of which each contained 100 rolls suspected to be ganja, and one small package containing 101 rolls suspected to be ganja. This means that in the plastic bag 1,001 rolls of the substance were found. All those packages were opened in the presence of the appellant.

At the time of the arrest, the situation was chaotic. According to the evidence of Insp Sakri 'the situation was chaotic when I arrested him.' See his evidence at p 16 in the record of appeal.

In the cross-examination Insp Sakri said that he saw another person running hurriedly from the place and crossing the main road nearby. Insp Sakri also said that the person might have come out of the car. 'I saw a man hurriedly crossing the road. It is possible that this man was the same man who came out from the car.' See p 20 of the record of appeal.

Constable Ganesan (PW5) who joined in the arrest said that he did not see a person coming out of the car. However, he said that even if there was anyone coming out of the car he probably might not know as his view was focused on the appellant. See p 25 of the record of appeal.

The chemist (PW1) had certified that all the things received by him from the police in this case were ganja.

In his defence the appellant admitted that the car was his although he did not have a driving licence. He worked as a general labourer in Syarikat Tasek Cement. Besides being a labourer he also managed a sundry shop. His car was frequently used by his elder brother and his friends.

On the day in question, ie 29 August 1983, his elder brother had borrowed the car at about 8am and returned it at 10am. At about 12.30 in the afternoon, his friend named Irman came to his shop and after being called by his wife he lent his car to Irman. The car was returned to him at 4pm. At that time, he said, he was sleeping and after being awakened by his wife he got up and Irman requested to be sent home by car as there was no taxi or bus in that place. The appellant agreed to send Irman back and during the journey they stopped near Restoran Rahman for a drink. When he was on the parking lot, he was arrested by the police. Irman immediately ran away from the car. That is the story of the defence of the appellant.

There are several basic issues raised by counsel for the appellant in this appeal. Three issues that were raised merit consideration.

The first is whether the evidence given by the chemist (PW1) who said that the things examined and analyzed by him were ganja but he did not say whether they were ganja within the meaning of s 2 of the Dangerous Drugs Act 1952. According to his evidence the chemist (PW1) had examined the 1,001 rolls and had said that all of them were 'vegetable matter' and he had used the words 'vegetable matter' not less than nine times. See pp 2 and 3 of the record of appeal and this officer (PW1) had used the word 'cannabis' only once and made no reference of the exhibit in relation to s 2 of the Dangerous Drugs Act 1952. Counsel had stressed that the report of the chemist could not be accepted as corroborative evidence to the evidence of PW1 because the chemist did not say in his evidence that the ganja

was ganja as defined under the Dangerous Drugs Act 1952.

It is certainly true that there is a difference between the drug heroin and the drug ganja or cannabis under the Dangerous Drugs Act 1952. After the amendment to the First Schedule of the Act in 1971, the difference between the two kinds of drugs becomes more obvious and now the drug heroin has become one of the dangerous drugs in the First Schedule but ganja or cannabis still has its own definition. See *PP* v *Ong Tee.*[1] Therefore it is not sufficient if there is only the evidence of the chemist that the thing is ganja but there must be evidence confirming that it is ganja as defined under the Dangerous Drugs Act 1952.

Looking at the report of the chemist in this case, it is found that he had certified in his report dated 2 November 1983 that the cannabis was as defined in the Dangerous Drugs (Amendment) Act 1980. See p 63 of the record of appeal. There is no doubt raised whatever that the exhibit examined and analyzed by the chemist (PW1) was ganja according to the requirement of the 1952 Act. This is based on the evidence of the chemist himself. It should certainly be held that the ganja stated by PW1 in his oral evidence must have the same meaning as given in his report before he gave the evidence. Therefore we rejected the argument of the counsel in this issue.

The second issue is concerned with the question whether the failure of the prosecution to call certain witnesses has consequently led to a break in the chain of evidence resulting in miscarriage of justice. According to the facts of this case, the exhibit had been delivered by Insp Sakri (PW4) to ASP Arunasalam (PW2), the investigating officer in this case. This happened on the day of the arrest. ASP Arunasalam (PW2) sent the exhibit to the chemist on 3 September 1983 and received it back on 2 November 1983. During that period, PW2 had carried out further investigation in this case. After receiving the exhibit back from the chemist on 2 November 1983, he kept the exhibit in his custody and the exhibit was kept in a safe the key to which was kept by him until September 1985. In the month of September 1985, PW2 took the exhibit from the safe and handed it to one police officer named ASP Yeow Ah Kee and to this officer. He also handed the key to the safe. Nevertheless, ASP Yeow Ah Kee was not called as a witness for the prosecution and his name was not included in the list of police officers which was delivered to the defence after the prosecution had closed its case.

In our view, failure by the prosecution to call ASP Yeow Ah Kee as a prosecution witness or to offer him to the defence is a serious one in the context of this case. This is because all the exhibits were in his custody from the year 1985 until the year 1989 — which is a rather long period! In such a situation there is surely doubt about the exhibit, and all the more so if seen from the certification of the drug that was raised in the first issue above.

It is certainly true that, as was said in *Su Ah Ping* v *PP*,[2] the Federal Court had held there that it is not required of the prosecution to call all the officers or the persons concerned who had seen or identified an exhibit. This is not the real intention of the law. *Su Ah Ping*[2] only decided the general principles. But the facts of one case differ from those of another and the duty of the prosecution in each case is to prove the case beyond any reasonable doubt to the court. The case must be clearly proved without [reasonable] doubt or question that can be raised about the exhibits. See also *Teo Hoe Chye* v *PP*[3] at p 229. There should be no break in the chain of evidence giving rise to doubt relating to the exhibits.

This court has also stressed the requirements of the law on the custody and control of the exhibits in the appeal case of *Mohd Osman bin Pawan* v *PP*[4] where the appellant had been convicted under s 39B(1)(a) of the Dangerous Drugs Act 1952 and doubts had arisen in a similar matter.

The third issue arose from the judgment of the learned trial judge. It is clearly seen in his judgment that the learned judge had rejected totally the story of the appellant in his defence because he was of the view that the story could not be accepted. It is not seen from his judgment that the learned judge had carefully considered the evidence given by Insp Sakri and Constable Ganesan concerning the probability of another person running away from the car. If the evidence of these two prosecution witnesses had been considered with the defence of the appellant, it is probable that the defence can be accepted especially from the aspect of the use of the car by a person other than the appellant. We therefore hold that the failure by the learned judge to consider carefully and to weigh the evidence given by the two prosecution witnesses when he was considering the defence of the appellant is a serious failure which has resulted in a miscarriage of justice to the appellant.

For the above reasons we allowed this appeal. We set aside the conviction and sentence passed on the appellant.

Appeal allowed.

Solicitors: *Kumar Sitham & Co.*

Judgment translated by *Wong Kim Fatt*